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MORALS FOR HOME, MORALS FOR OFFICE: THE DOUBLE ETHICAL LIFE OF A CIVIL LITIGATOR

PATRICIA L. RIZZO*

I. INTRODUCTION

A woman mentions at a social gathering that she is a lawyer, and nearly everyone produces a "bad lawyer" story, either true or legendary. If lawyers in general are subject to these reactions, litigators are nearly guaranteed such negative responses. As a critic of the legal profession has noted, "[t]he bad reputation of lawyers reflects general dissatisfaction with litigation, yet comparatively few lawyers engage in trial practice."¹ Despite the fact that the vast majority of lawyers are not litigators, it is the litigators who for the public represent what lawyers do, namely, try cases in court. It is also the litigators who, in the public's eye, demonstrate nearly everything which is negative about the legal profession. According to legal scholar Murray Schwartz, "[m]uch, but certainly not all, of the historic and current hostility toward lawyers derives, I believe, from the clash of values between the basic professional ethics . . . and common notions of morality and fairness."² In this quote, Professor Schwartz identifies the tension between personal and professional ethics which is constantly tugging at some litigators and which others seem easily able to ignore.

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¹ Michael Josephson, *Unloved Lawyers*, in 1 *ETHICS: EASIER SAID THAN DONE*, No. 4, at 48 (1989).

² MICHAEL J. KELLY, *LEGAL ETHICS AND LEGAL EDUCATION* 2 (1980).

From the beginning of legal training, lawyers are taught that when serving as an advocate, they can act in ways which would otherwise be immoral. In fact, a lawyer is encouraged, if not directed, to do all that is legally possible to represent a client and not to permit any personal feelings, beliefs or morals to interfere with client representation. To ensure professionalism, a lawyer's actions in serving as an advocate are governed by certain primary principles³ which are imprinted upon all law students.

First, lawyers must not use their own moral convictions to judge a client. Unlike a physician, a lawyer does not always serve what may be termed "good" interests; rather, a lawyer must act only as the agent for the client, arguing the client's position, be it good or not good, standing in place of the client in the legal system. Second, a lawyer must zealously represent the client, and any action which is legal can appropriately be taken on behalf of the client. The lawyer seldom examines the morality of these acts, except perhaps to determine if they violate any portion of a code of professional ethics. Lawyers typically seek excuses for such actions by claiming that justice is served through zealous representation.⁴ Alternatively, lawyers claim that their behavior in zealous representation is excused because they are either playing according to the rules of the litigation game or are playing to escape the confines of the rules. In either case, like Pilate, they lay blame on the system.⁵ Finally, through the use of role morals, lawyers exonerate themselves from accepting any personal moral responsibility either for the position they are advocating for the client or for the methods zealously used to further that position. "Role morals," or those "special obligations attached to certain social roles,"⁶ are used by attorneys to excuse professional behavior which may be contrary to their personal morals. "Personal morals" are those which define an individual's morality and whose application are not circumscribed by activities; rather, they apply under all circumstances.

Although these principles provide all attorneys with claimed legitimacy for their actions, it is the litigators who most frequently employ them. From the litigator's standpoint, the very characteristics which cause the public to heap criticism on trial attorneys are virtues.⁷ At the core of this criticism is the inescapable truth that litigators boldly claim that they bring no personal morals to their work, and they instead use a set of role morals which allows them to act in ways which in any other

³ See RAND JACK AND DANA C. JACK, *MORAL VISION AND PROFESSIONAL DECISIONS* 29 (1989) [hereinafter JACK].

⁴ *Id.* at 31.

⁵ See *id.* at 22-23.

⁶ DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 105 (1988).

⁷ See Andreas Eshete, *Does a Lawyer's Character Matter?*, in *THE GOOD LAWYER* 270, 272 (David Luban ed. 1983).

facet of their lives would be unacceptable, not tolerated and possibly immoral.

In view of the above-described creed by which litigators live, when, if ever, is it ethical for trial attorneys to abdicate their personal morals while acting professionally? What effect does such continuous abdication have on trial lawyers, and on the colleagues dealing with them? Attorney-author Rand Jack asks, "[w]hat is a reasonable response to the fact that many people entering law find basic incompatibilities with the advocate role?"⁸ Do these incompatibilities exist because to succeed professionally, a lawyer should cease to develop as a moral person? Is it possible to succeed professionally and retain personal morals while acting as an advocate? Phrased slightly differently, the question posed by lawyer and Jesuit Christopher F. Mooney is, "can an attorney be loyal to the traditional notions of lawyer-client privilege and of zealous advocacy, and at the same time remain a good and moral person?"⁹ Legal ethicist Susan Wolf responds that, "even if it is possible for someone to be both a good lawyer and a good person, there may be identifiable risks of specific ways in which someone may fail to achieve or be diverted from the aspirations to achieve these goals."¹⁰ Does this support that one can not be both a good lawyer and a moral person? As legal ethicist Gerald Postema questions, "can the [legal] *professional* identity be acquired without significant damage to one's personal or moral integrity?"¹¹ A logical beginning for answering these questions is to examine the American adversary system.

II. THE ADVERSARY SYSTEM

The American legal system is adversarial, with each party to a law suit, either personally or through an attorney, investigating his case and presenting facts to an impartial tribunal while simultaneously seeking to rebut the evidence offered by the opposition. The entire American historical experience is punctuated by instances of struggles for individual rights, and against this background it is not surprising that the American legal system has developed as an adversarial one. Americans run to litigate, using courtrooms as the most popular place to settle disputes both large and small. It is only very slowly that alternate forms of dispute reso-

⁸ Jack, *supra* note 3, at 155.

⁹ Christopher J. Mooney, S.J., *Law: A Vocation to Justice and Love in THE PROFESSIONS IN ETHICAL CONTEXT: VOCATIONS TO JUSTICE AND LOVE—PROCEEDINGS OF THE THEOLOGY INSTITUTE OF VILLANOVA UNIVERSITY* 80 (1986).

¹⁰ Susan Wolf, *Ethics, Legal Ethics and the Ethics of Law*, in *THE GOOD LAWYER*, *supra* note 7, at 38, 52.

¹¹ Gerald J. Postema, *Self-Image, Integrity and Professional Responsibility*, in *THE GOOD LAWYER*, *supra* note 7, at 286, 287.

lution are gaining credibility and widened use.¹²

In great part, the American adversarial system is based on rules and rights, with the law, in theory if not in fact, being applied in like manner to all. Lawyers are hired to use the rules to obtain rights for their clients, although "rights" can often be translated as "what the client wants" and can have nothing whatsoever to do with genuine rights protected by law,¹³ or with having each party receive his just due. Legal ethicist David Luban writes that, "lawyers themselves do not see the point of what they do as defending their clients' legal rights, but as using the law to get their clients what they want."¹⁴ This is because, according to Luban, "under the adversary system, an exemplary lawyer is required to indulge in overkill to obtain as legal rights benefits that in fact may not be legal rights."¹⁵

This commitment to pursuing and obtaining what the client wants is extracted initially from law students. Law school does not teach law; it teaches survival in the adversary system,¹⁶ with the primary battle cry to students being "think like lawyers". In addition to being taught to think in a new way, law students are also encouraged to leave personal morals at the door and to embrace a brand new set of ethics, designed to aid them in their role as lawyers. Morals become reduced to checking the code of professional responsibility; if the code does not prohibit an act, the act is moral. Legal ethicists have identified this substitution of morals as the beginning of a process which can result in serious ethical problems for the profession. Father Mooney, in discussing law school education, writes that,

technical analysis that continually excludes human feeling and concern leads to a sense that these qualities are somehow antithetical to a thoroughly rational inquiry. . . . Indeed, when such skills alone are cultivated, feelings and emotions tend to become dulled, and the lawyer as a human person can lose that sensitivity so essential in a one-to-one relationship with clients.¹⁷

Unfortunately, Father Mooney's concerns represent the minority view among today's legal educators. Lawyers are not taught to be sensitive. Emotional caring is considered to be detrimental to professionalism. Ethicists sharing Father Mooney's thoughts have suggested that law schools institute clinical programs in which students learn to make ethical decisions in real life situations.¹⁸ Still others believe that ethics curricula

¹² Mooney, *supra* note 9, at 64-65.

¹³ LUBAN, *supra* note 6, at 76.

¹⁴ *Id.*

¹⁵ *Id.* at 77.

¹⁶ See Eshete, *supra* note 7, at 271-72.

¹⁷ Mooney, *supra* note 9, at 74.

¹⁸ See KELLY, *supra* note 2, at 53-54.

should be broadened to include teaching attorneys to make decisions based on their personal morals.¹⁹ This, of course, compels students first to identify and to examine their own morals. At present, the typical law school ethics class instead revolves around case studies based on violations of codes of professional responsibility. There is virtually no discussion of using personal morals as the foundation for finding an act to be unethical. For example, intentionally withholding non-privileged information from an adversary and forcing him to seek court relief causes both sides in a law suit to expend extra time and money and is dishonest. Yet, such actions are not explicitly prohibited by most ethics codes, and attorneys practicing law this way are considered to be zealous and professional advocates. Law students who claim that behavior such as this is wrong simply because it is immoral are swiftly criticized and are directed to find an appropriate code section which bans the behavior. Suggestions, therefore, to encourage lawyers to use the same morals in their professional actions as they do in their personal ones are revolutionary and would no doubt fail to be easily accepted by law school educators and practicing attorneys. And yet, if lawyers are to function proficiently and with their personal morals in good working order, they must first be trained in the use of their personal morals in professional settings. Before these radical ideas can become part of the law school curriculum, however, the absence of personal morals must be perceived not as a blessing, but rather as a problem.

Once the new lawyer begins to practice, the dilemmas stemming from abandonment of personal morals begin in earnest. How open and honest should one be with opponents? With clients? With the court? What is the line between being an aggressive advocate and being an abusive attacker? Is it weakness or graciousness to give an extension to an adversary? The new lawyer quickly sees that it is for good reason that the legal system is called "adversarial", not "advocacy". Philosophy professor Andreas Eshete explains that, "[t]o excel as a lawyer, combative character traits such as cunning are most beneficial. In this way, the conduct required of an adversarial lawyer gradually produces undesirable features on his character."²⁰ Behavior which, in a lawyer's personal life would be neither condoned nor tolerated, is upheld and applauded when done in a litigation setting. This includes savage verbal attacks on opposing counsel, threats, and airs of exaggerated importance. The difficulty in retaining a personal moral vision while practicing law can be corrected, ethicists argue, by the introduction of personal ethics by practitioners into their work. Again, such a new outlook will take hold only after the profession

¹⁹ See JACK, *supra* note 3, at 167.

²⁰ Eshete, *supra* note 7, at 274-75.

accepts the absence of personal ethics as a problem. Even at that point, change will occur only on a lawyer-by-lawyer basis, with each attorney looking inside herself for new answers. Morality can not be commanded or legislated.

III. PRINCIPLES GOVERNING LAWYERS' PROFESSIONAL ACTIONS

One of the key principles to which litigators adhere in their professional behavior is that they are not to judge the morality of what the client wants; they are only to act as the client's agent.²¹ This principle is further subdivided into the Principles of Partisanship and Neutrality. Under the Principle of Partisanship, a lawyer must be utterly devoted to the interests of her client. The client, in hiring the lawyer, buys the entire person of the lawyer, including, at least during representation, the lawyer's personal beliefs.²² The lawyer, therefore, must be morally malleable to be a proficient advocate. Attorney Jack writes, "[d]exterity or lack of apparent principle in adopting the cause of another becomes a prime professional asset."²³ The companion Principle of Neutrality requires that a lawyer refrain from passing moral judgment on the client or his goals, and consequently, on the methods used by the lawyer to reach those goals. Some ethicists have found the Principles of Partisanship and Neutrality to be at odds with each other,²⁴ but in reality, they are quite compatible. A lawyer, and especially a litigator, must be absolutely partisan in favor of the client. Partisanship and Neutrality require that while acting on behalf of the client, the lawyer will not consider competing interests, including personal morals. Therefore, in the current legal system, a litigator, by job definition, must not bring personal morals into the work-place. Lawyers, it appears, must be morally fragmented to be successful. At what price is success bought? Some lawyers, standing true to their professional demands, gradually lose any sense of personal ethics.

For others, moral distancing develops. Moral distancing, the separation of one's personal morals from the acts at hand, is a problem which occurs frequently when one's personal morals conflict with what one's job requires. Attorneys experiencing moral distancing realize that to be successful professionally they should utilize role morals, but they can not do so.²⁵ Moral distancing can lead to job dissatisfaction, poor lawyering and personal depression. Attorney Jack warns that, "[t]his problem of moral distance between personal and professional self is inherent in an occupa-

²¹ See JACK, *supra* note 3, at 29.

²² *Id.*

²³ *Id.* at 30.

²⁴ See *id.* at 32.

²⁵ See *id.* at 35.

tion that defines professionalism in terms of neutral partisanship and the ability to speak the words and champion the cause of another."²⁶ It is an unrealistic and perhaps an unwanted expectation that the entire adversarial system will change—lawyers should be completely committed to their clients, and this is a significant benefit of the adversary system. Would it be anything but a benefit to the profession itself, though, if each lawyer brought to the system both a commitment to his clients founded on personal beliefs and some regard for all, clients and adversaries alike? Lawyers must accept that even when acting on behalf of a client, they are human beings acting either with, or against, their own morals. Morally neutral actions simply do not exist, and lawyers need to develop the sense, "that what one does as an individual is morally important."²⁷

As well as not standing in judgment of a client, a lawyer is also called to represent a client zealously. This is known as the Principle of Professionalism. The first modern invocation of this principle was made in 1820 by Lord Brougham, who was counsel to Queen Caroline of England during her divorce trial. Lord Brougham advised the court and his opponent, King George IV, that he would do all within his power to aid his client, even if national security would thereby be threatened. In that specific instance, Lord Brougham was impliedly threatening to reveal the King's secret marriage to a Catholic if Queen Caroline's interests did not prevail.²⁸ The theme of Lord Brougham's speech has since become the rallying standard for the zealous (and overly zealous) litigator. Under the Principle of Professionalism, a lawyer may, and should, utilize all available tools permitted by law to win the case. In this way, again, the lawyer is relieved from the burden of making moral decisions—if an action is not prohibited by a code of professional ethics, it is permitted. As David Luban notes, "[t]he limits of the law inevitably lie beyond moral limits, and zealous advocacy always means zeal at the margin."²⁹ While zeal is both admirable and essential, it should not demand of a lawyer that all stops be pulled in order to represent a client in a professional manner. Moral judgment is required for a lawyer to decide when it would be inappropriate, harmful or immoral to take a particular course of action, even if a code of professional ethics permits the act. For example, should a litigator cross-examining a witness delve into areas, which are highly personal and embarrassing, merely to unnerve the opposition, where such questioning is immaterial to the case at hand? The fact that an attorney

²⁶ *Id.* at 112-13.

²⁷ Daniel S. Kleinberger, *Wanted: An Ethos of Personal Responsibility—Why Codes of Ethics and Schools of Law Don't Make for Ethical Lawyers*, 21 CONN. L. REV. 365, 370 (1989).

²⁸ See JETHRO K. LIEBERMAN, *CRISIS AT THE BAR* 50-51 (1978).

²⁹ DAVID LUBAN, *THE ADVERSARY SYSTEM EXCUSE* 7 (1981).

may be acting professionally does not take that act beyond the boundaries of morals.

The third principle by which attorneys act combines the Principles of Partisanship and Neutrality and is known as the Principle of Non-Accountability.³⁰ It provides that lawyers need accept no moral responsibility for their professional actions. This concept of moral immunity for business acts, known as role morality, is not unique to lawyers. To a certain extent, everyone has a persona for the work-place which is distinct from how we behave in our personal lives. What is unique to lawyers, however, is that it is a lawyer's role to assume the morals of another person, to receive pay for speaking for someone else and for pretending to embrace whatever position the client demands. Rand Jack comments, "[t]o varying degrees, attorneys occupy two moral worlds - the complex, multifaceted world of personal morality and the more rarefied, eccentric domain of the practicing attorney."³¹ Jack, though, has theorized that lawyers who are oriented in their practice towards preserving rights can more easily identify with role morals.³² These lawyers often have an absence of moral tension between their professional and personal lives.³³ These lawyers are also closely in step with the requirements of the adversarial system, with its focus on protecting rights, or rather, on obtaining what the client wants at whatever cost. Lawyers who are instead oriented towards caring for their clients and others have a difficulty identifying with role morals and with the system itself, and likewise suffer moral tension.³⁴ Jack also explored whether it is male or female attorneys who have a greater difficulty with assuming role morals.³⁵ According to Jack, "male" or "rights" morality is based on the principles that individuals should be allowed to act in an autonomous fashion, rules should be limited, rights must be protected, and there should be general restraint from governmental interference. "Female" or "care" morality is premised on relationships, an interdependent, caring community, empathy, and the avoidance of harm to others.³⁶ Lest Jack be accused of sexism in defining these moralities, he does not tie the categories to the sexes and acknowledges that some female attorneys can, and do, have "male" morality, and also that there are male lawyers who have "female" morality. The research of Jack and his wife, psychologist Dana Jack, however, reveals that it is more common for female attorneys to experience moral tension be-

³⁰ *Id.* at 84.

³¹ See JACK, *supra* note 3, at 49.

³² See *id.* at 126.

³³ *Id.*

³⁴ See *id.*

³⁵ *Id.* at xi.

³⁶ See *id.* at 7-9.

tween their role morals and personal beliefs.³⁷ This tension, although painful for the attorney experiencing it, is not necessarily bad; it may even be morally productive. Lawyers must re-learn that they are humans first and that they have to live with the consequences of all of their acts, including professional ones. A resort to role morals does not place them beyond this fact of the human condition.³⁸

Of the lawyers who are strained by their double moral lives, some survive by virtually killing their personal morals, while others completely separate business from personal ethics, judging their own morality only on what they do in their private lives.³⁹ Still others indulge in over-identification, by which their professional and personal ethics are folded together.⁴⁰ These lawyers use their professional ethics for all actions, personal and professional. A few lawyers work to infuse their practice with a care orientation, thereby risking being viewed by clients and colleagues as either unprofessional or incompetent.⁴¹ The Jacks identified four precise categories of how lawyers handle moral tension. Type 1 attorneys have a virtual match between personal and professional morals. As one attorney explained, "what I personally think about right and wrong is not incompatible with what I do for a living."⁴² For this lawyer, the system tells him what is wrong, both personally and professionally, and he has no need to make separate, personal moral judgments. He has over-identified himself with his professional morals, which are in fact his only morals, and he does not suffer moral tension.

Type 2 lawyers experience moral tension and resolve it by absolutely putting business morals first in business settings. These lawyers acknowledge that they have separate personal morals, but believe that to be successful, they must bury them, and live by the codes established by the legal system.⁴³

Lawyers who are Type 3 choose to engage in battle between their personal and professional morals. While Type 2 lawyers concede that professional ethics must rule in the work-place, Type 3's reach this same conclusion only after deep moral struggle.⁴⁴ It is because she struggles that the Type 3 lawyer may be on the shakiest moral ground. The Type 3 fully appreciates this fact when she is called by professional morals to betray herself, and she nonetheless chooses to act in contradiction of per-

³⁷ *Id.* at 120, 145.

³⁸ Wolf, *supra* note 10, at 56.

³⁹ Eshete, *supra* note 7, at 275-76.

⁴⁰ See JACK, *supra* note 3, at 41.

⁴¹ *Id.* at 149.

⁴² *Id.* at 100 (quoting George Willis).

⁴³ *Id.* at 99, 107, 110.

⁴⁴ *Id.* at 125.

sonal morals to succeed as a lawyer.

Finally, the Type 4 lawyer chooses to follow his personal ethics in the business world, even to his professional detriment. As Jack explains,

Such unbounded individuality allows the attorney to be true to self, with all of the private and public benefits of such a posture. . . . There are also losses: damage to career, isolation, becoming unmoored from historical and community wisdom, masking immorality as renegade morality, injury to a legal system on which depends much that is valuable to our society.⁴⁵

While the potential Type 4 losses enumerated by Jack are legitimate, can they really be matched against the absolute loss of self which can be suffered by Types 1, 2, and 3?

With attorneys, the resort to role morals is most frequent with litigators. The image of litigators as soldiers is so strong that the adversary system itself has been likened to war and justified under the Just War theory, the development of which is attributed to St. Augustine. As with a just war, the adversary system, and its demand that participants use role morals, is seen as justified only in certain situations, and even where justified, its conduct must be regulated.⁴⁶ Under the Just War theory as applied to litigators, the role of "attorney" will not shield anyone from the moral consequences of her acts. A lawyer may represent clients whose morals do not match hers if the lawyer can see some good resulting from the representation; otherwise, the lawyer is acting immorally. The lawyer cannot accept representation which requires advocating an immoral position if she does so for her own self-aggrandizement, or she will be acting immorally.⁴⁷ Under this theory, a lawyer is required to exercise personal moral judgment while acting professionally, and the lawyer's intent becomes a decisive factor in determining morality. This element of intent creates an additional analogy, between a litigator's acts and Thomas Aquinas' Theory of Double Effect.⁴⁸ That is, while an immoral act is normally something to be avoided, it may nonetheless be required, provided that the intent behind it is not reasons of immorality, but some higher, better reason.⁴⁹ All hopes of finding safe harbor in either the Just War or Double Effect theories for role morals therefore vanish unless the im-

⁴⁵ *Id.* at 125-26.

⁴⁶ Alan Donagan, *Justifying Legal Practice in the Adversary System*, in *THE GOOD LAWYER*, *supra* note 7, at 124.

⁴⁷ *Id.* at 135.

⁴⁸ THOMAS AQUINAS, *Summa Theologiae*, in *ST. THOMAS ON POLITICS AND ETHICS*, 70 (Paul E. Sigmund ed. & trans., 1988)

⁴⁹ Thomas' original use of Double Effect was to sanction the unintentional killing of an aggressor. Modern use of the theory has extended it to justification of the killing of non-combatants during war and, in the instant example, to the use of role morals to excuse what would otherwise be immoral behavior.

moral act itself is justified. For example, the American Civil Liberties Union may morally represent a Nazi fighting deportation, in order to preserve the constitutionally guaranteed right to a trial. In this instance, lawyers are performing "their duties, not with the intention of seeking their own ends but only of helping the law"⁵⁰ Lawyers seeing a chance to gain free publicity through such representation are acting for themselves and are acting immorally, because their acts are not justified, and therefore, neither is their use of role morals.

IV. IS THE ADVERSARY SYSTEM JUSTIFIED?

According to David Luban, one justification for role morals is that they are necessary for the adversary system to function, and that the system itself is good.⁵¹ Borrowing again from the Just War and Double Effect Theories, in order for this excuse to have merit, the claim that the adversary system is good must first be accurate.⁵² For Luban, this is a somewhat questionable proposition.

The standard justifications for the adversary system are that it is the best mode of inquiry for reaching the truth, and therefore, fairness; it provides the single best means for protecting the rights of litigants; and, the professional representation guarantees that the dignity of all parties will be respected because all will be certain to have their causes presented in the most competent and efficient manner. Each of these justifications, while containing some truth, is also subject to criticism. To begin with, critics question whether the adversary system does provide the best means of revealing truth,⁵³ especially since it produces self-interested rather than disinterested investigations.⁵⁴ As law professor Deborah Rhode notes, "[l]awyers are concerned with the production of belief, not of knowledge. Why assume that the fairest results will necessarily emerge from two advocates arguing as unfairly as possible on opposite sides?"⁵⁵ The party who can best persuade that it has truth, rather than the party that in fact has truth, is rewarded by the adversary system. Is such a system necessarily the fairest, such that unfair tactics can be justified in order to preserve it?

The argument that the adversary system can best protect the rights of individuals also falls short in justifying the system. Are rights truly

⁵⁰ Martin Luther, *Temporal Authority: To What Extent It Should Be Obeyed*, in 2 *SELECTED WRITINGS OF MARTIN LUTHER* 293 (Theodore G. Toppert ed., 1967).

⁵¹ LUBAN, *supra* note 6, at 129.

⁵² *Id.*

⁵³ Donagan, *supra* note 46, at 127.

⁵⁴ See LUBAN, *supra* note 29, at 17.

⁵⁵ Deborah L. Rhode, *Ethics Forum*, in 1 *ETHICS: EASIER SAID THAN DONE* No. 4 at 74 (1989).

being protected, or are they being manufactured, with the party most able and willing to manipulate the system taking all? David Luban correctly maintains that the true worth of the adversary system must be determined by its operation in the civil arena,⁵⁶ because it is there that justice supposedly is delivered; with criminal matters, the primary purpose of litigation is to afford the accused protection of constitutional rights, and this serious reason removes any doubt regarding the merit of, and need for, an adversarial system.⁵⁷ Because the stakes are based on human life and freedom in criminal litigation, as opposed to dollars, the combative nature of adversary litigation is appropriate with criminal trials, where the defense should be able to compel the prosecution to prove every facet of its case. The adversarial system can be justified for criminal trials, but do civil suits, where only dollars are in issue, require the harsh methods of the adversarial system?

Regarding professional representation, the idea remains that because all sides to a suit have counsel, all are protected, thereby providing a check on the behavior of an overly zealous attorney.⁵⁸ In reality, however, what is most likely to occur is that faced with a pugnacious opponent, a lawyer is compelled to respond in like manner. Rather than checking obnoxious and unprofessional attorney behavior, the adversary system multiplies it. "Seeing someone approach peril," Rand Jack comments, "most people would feel morally bound to give warning. An advocate not only watches with glee . . . but will do everything possible to lubricate progress, including setting and, if feasible, disguising the trap."⁵⁹

The civil adversary system often demands ruthless behavior from litigators. Despite this, the system does produce some benefits, such as dispute resolution and providing a forum to right a wrong. Nonetheless, criticism of the system can fairly be made. Even given these benefits, the system is not so good that it provides justification for the behavior so common to trial lawyers. Again, David Luban, comparing the system to an institution, theorizes that if an institution is justified only because it is there, an agent is unable to appeal to it to excuse any but "the most insignificant deviations from common morality."⁶⁰ Is the civil trial system justified only because it is there? Can attorneys reasonably use the system as the excuse for their use of role morals? Has the civil adversarial system shown itself to be so vital that its existence is a necessity, or does the system remain unchallenged because it is what there is, and we cannot imagine a replacement? Can we continue to excuse the absence of

⁵⁶ Comments and opinions expressed herein are limited to the civil justice system.

⁵⁷ See LUBAN, *supra* note 6, at 66.

⁵⁸ *Id.* at 78.

⁵⁹ JACK, *supra* note 3, at 37.

⁶⁰ See LUBAN, *supra* note 6, at 154.

personal morals among litigators, claiming that the adversary system demands that attorneys be free of personal morals in their professional lives?

If we fail to find that the adversary system is the best means for producing truth and protecting rights, and if we admit that it does not encourage professional behavior, how can such a system be justified? And, if we cannot justify the system, how can we condone the use of role morals and continue thereby to absolve attorneys from failing to use personal moral judgment? David Luban reasons, "[a]nything except the most trivial peccadillo that is morally wrong for a non-lawyer to do on behalf of another person is morally wrong for a lawyer to do as well. The lawyer's role carries no special privileges and immunities."⁶¹ Under Luban's theory, and borrowing again from the Double Effect theory, if a lawyer's act which is normally immoral is permissible in certain instances, this is because it would be permissible to anyone; the lawyer is not given extraordinary license to act merely because he is a lawyer.⁶² The adversary system does not function as a shield for a litigator's outrageous behavior. A lawyer must use her own morals, and where they conflict with professional morals, professional morals must be abandoned.⁶³

V. CODES OF ETHICS AND RULES OF PROFESSIONAL CONDUCT

For attorneys, a prime ingredient in role morals is a code of ethics, representing the attempt by courts, lawyers and bar associations to compose a list of do's and do not's which often function in lieu of a conscience for a lawyer. These codes have been promulgated separately in each state. There is no single code governing all lawyers, although most codes are based at least in part on the model codes designed by the American Bar Association ("ABA"). In 1887, Alabama became the first state to formulate a code of ethics. In 1908, the ABA published the Canons of Ethics, its first model code. The most recent ABA code, the Model Rules of Professional Conduct, was presented in August 1983 and forms the basis for the revised code now governing Pennsylvania lawyers.

Among the professions, lawyers have the most comprehensive codes of ethics and simultaneously seem to receive the most criticism for unethical behavior. Some legal ethicists argue that the codes themselves are unethical,⁶⁴ and therefore their presence does little to promote ethical behavior. Jethro Lieberman believes that, "[t]he crisis of the bar springs from the inefficacy of the formal rules in curbing the worst instincts of

⁶¹ *Id.*

⁶² *Id.*

⁶³ See LUBAN, *supra* note 29, at 42.

⁶⁴ See LIEBERMAN, *supra* note 28, at 15.

the best lawyers."⁶⁵ In fact, the very presence of a code is a green light for many attorneys to use it in place of personal morals. As ethicist Michael Josephson comments,

[l]awyers often tend to look at the code as THE rules, as the law of ethics. Since lawyers are professional interpreters of written laws, it is natural for them to take a similar 'legalistic' approach to written ethics rules—if it is not forbidden by the law or the code, it is ethical.⁶⁶

The codes rarely discuss violations of ethics in attorneys' personal lives. With work-related violations, the codes typically state what a lawyer should do, but particular contrary acts are seldom prohibited or condemned. The codes do not supply morals and do not clearly delineate a right from a wrong. Because codes, therefore, are morally neutral, it is possible that attorneys, in adhering to them can become "amoral, neutral technician[s],"⁶⁷ bringing the same absence of morals into their personal lives.

The adherence to codes may make attorneys the greatest natural law enthusiasts. Having created their own black and white world of ethics, they can then be governed by a concise set of do's and do not's, with the belief that their lists of morals cover all life situations and are correct and adequate for all circumstances without embellishment of personal morals. Why have attorneys so readily abandoned the freedom and responsibility which belong to personal moral choice? Why are personal morals held to be inadequate for making professional decisions? If a personal moral code carries one through all of life's difficult relationships and problems, it surely should be adequate in business situations. In any event, a code of professional ethics, like the Ten Commandments, may provide an excellent starting point for developing morals, but in no way can it be a substitute for them.

In the 1988 Rules of Professional Conduct governing Pennsylvania lawyers, the Preamble repeats what is stated in the ABA Model Rules, that in addition to being governed by the Rules and by law, "a lawyer is also guided by personal conscience and the approbation of professional peers."⁶⁸ The Preamble, however, like the Comments to the Rules, is not binding on attorneys.

The Pennsylvania codification of the Principles of Partisanship and Neutrality, again taken from the ABA Model Rules, is found in Rule 1.2(b), which states in pertinent part:

⁶⁵ *Id.* at 36.

⁶⁶ See Josephson, *supra* note 1, at 53.

⁶⁷ Simon Y. Balian, *Personal Responsibility For Professional Actions*, 32 CATH. LAW. 337, 337 (1989).

⁶⁸ PROF. CONDUCT, 42 PA. CONS. STAT. ANN. pmbl. (1988).

Scope of Representation—A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

This particular version of the Partisanship and Neutrality Principles was new in 1988 and, according to its Comment, is designed to encourage the availability of legal representation for all causes, no matter how repugnant.⁶⁹ Despite the disclaimer set forth in the Rule, it is difficult to accept how zealous civil advocacy can be seen as anything besides a ringing endorsement of a client's position, and if the lawyer does not believe that in presenting a client's cause a higher good will result, then the problem of justification of role morals surfaces again. Of course, the goal that even the most unpopular causes be represented is one of the most noble and moral attributes of the adversary system. It is only when the principle becomes twisted to mean that lawyers need not adhere to their own morals in undertaking representation of a client that the nobility and morality of the adversary system, and the legal profession, is itself defeated. For example, can a lawyer making a tidy living by representing clients with phony injuries morally claim that such practice is not endorsing fraudulent behavior, but instead is only "using" the system?

Zealous advocacy in Pennsylvania is governed by Rule 1.3, which is borrowed from the ABA Model Rules and states:

Diligence—A lawyer shall act with reasonable diligence and promptness in representing a client.⁷⁰

The Comment provides, in pertinent part, that:

A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. However, a lawyer is not bound to press for every advantage that might be realized for a client.⁷¹

By the Comment, the Pennsylvania Supreme Court and Bar acknowledged the danger present with limitless zeal; yet, despite having had an opportunity present to curtail outrageous attorney conduct, such as hiding evidence, failing to respond to discovery requests and outright lying, the Court and the Bar chose instead to put their admonition in the non-binding Comment.⁷²

Under Rule 8.3, Pennsylvania lawyers are obligated to report colleagues who violate the Rules where the violation "raises a substantial

⁶⁹ *Id.*, Comments to Rule 1.2.

⁷⁰ *Id.*, Rule 1.3.

⁷¹ *Id.*, Comments to Rule 1.3.

⁷² A proposed amendment to ABA Model Rule 1.3, which was withdrawn, would have used "zeal" in place of "diligence." See THE LEGISLATIVE HISTORY OF THE MODEL RULES OF PROFESSIONAL CONDUCT: THEIR DEVELOPMENT IN THE ABA HOUSE OF DELEGATES 36 (1987).

question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects."⁷³ The Comment states that a "measure of judgment"⁷⁴ is required in complying with the Rule. This Rule presents interesting ethical considerations, as it does not provide the answer as to what conduct is reportable; it requires attorneys to employ personal moral judgments in policing the profession. The Rule also states that not even all violations of the Rule are reportable. If this important self-regulating aspect of the profession cannot be managed by pre-fabricated business morals, but instead requires personal ethics, how can basic lawyering not also demand daily use of personal ethics.

If Rule 8.3 leads lawyers towards personal morals, 8.4 drives them away, in discussing what actually constitutes attorney misconduct. The Rule, verbatim from the Model Rules, states, among other things, that lawyers shall not "engage in conduct involving dishonesty, fraud, deceit or misrepresentation."⁷⁵ This prohibition seems clear until one reads the accompanying Comment, which states:

Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offense carry no such implication Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, or breach of trust, or serious interference with the administration of justice are in that category.⁷⁶

In the estimation of the Pennsylvania Supreme Court and the Bar, a lawyer acting in a professional setting need be moral only in certain, well-defined categories. Rules such as these typically are drafted to reach only specific behavior because there is a systemic repugnance to imposing punishment for violating vague, subjective or confusing statutes. The rule and comment, however, clearly indicate that immoral conduct simply may not be reachable under the Code by design.

Recently, the Philadelphia Bar Association decided that the list of do's and do not's found in the Rules needed some embellishment. Although the Bar Association cannot legally mandate attorney conduct, it can suggest appropriate behavior, which it did with its June 1990 publication of "Working Rules of Professionalism." These seven rules are actually prescriptions for attorney etiquette. Among other bits of advice, they encourage lawyers to "treat with civility opposing counsel," "be punctual," and "if your adversary is entitled to something, provide it without

⁷³ PROF. CONDUCT, *supra* note 68, Rule 8.3(a).

⁷⁴ *Id.*, Comments to Rule 8.3.

⁷⁵ *Id.*, Rule 8.4(c).

⁷⁶ *Id.*, Comments to Rule 8.4.

necessary formalities.”⁷⁷ It is a sad commentary on the fabled Philadelphia lawyer that even simple courtesy must now be demanded of her. Given that, it is small wonder that personal morals are so often absent from lawyers’ day-to-day business dealings.

VI. CONCLUSION

The justification used by the Bar to excuse the use of role morals, namely, that the adversary system requires it, is without weight. No legal system, not even the adversary one, can excuse a lawyer’s relinquishment of personal morals. Morals are among those differences which separate humans from the lower creatures. Morals are as individual as fingerprints, and they define each of us as separate beings; without them, a person’s identity is diminished. Simply put, no profession is important enough to demand that its members cease to use personal morals. Legal ethicist, Andreas Eshete writes, “[t]hough there may be rational disagreement over how much of morality and which dimensions of it figure in the law, there is little doubt that the law, even in its mundane moments, is not . . . an institution sealed off from moral life.”⁷⁸ No moral act can come from abdication of personal morals.

The Principle of Non-Accountability, the theory that a lawyer is not morally accountable while acting professionally, is baseless. As explained by Geoffrey Hazard, “[t]he fact is that the modern legal adviser is an actor in the situation in which he gives advice. And as such, he is accountable.”⁷⁹ How much more accountable is the litigator, who more than rendering advice, actually argues and manipulates on the client’s behalf.

When a lawyer acts without personal morals, not only is she less human, but her colleagues also suffer. In dealing warily and continuously with the borderline-ethical opponent, lawyers often resort to the very tactics which they criticize. Lawyers learn early on that too often winning requires stooping to the level of the lawyer practicing without personal ethics. Evidence of this unfortunate fact is seen in the recent “codes of civility” enacted by many bar associations, Philadelphia among them. Simon Balian writes, “[i]n practice, the zealous advocacy model has changed the purpose of the legal system from an exercise in the search for truth and justice to a duel to prevail over the opponent at any cost.”⁸⁰ What lawyers do not see is that the cost of this behavior is the loss of part of themselves. Still, how do lawyers answer the dilemma of fighting a just fight against an unjust opponent? Not only is there pressure from

⁷⁷ PHILADELPHIA BAR ASS’N, WORKING RULES OF PROFESSIONALISM (June 28, 1990).

⁷⁸ Eshete, *supra* note 7, at 278.

⁷⁹ GEOFFREY C. HAZARD, JR., ETHICS IN THE PRACTICE OF LAW 151 (1978).

⁸⁰ Balian, *supra* note 67, at 345.

colleagues, but clients and employers also push lawyers to leave personal feelings out of business dealings. A lawyer who does not behave as aggressively as possible is often perceived as weak or, worse yet, "unprofessional." Is the situation hopeless? No, but a solution does not lie with drafting more codes; codes do not make lawyers ethical. Judge Thomas Reavley writes,

We may do what we can with canons of ethics and moral teachings, but they will never give us a just community if we do not value highly the object of these rules: the human creature. The sure foundation of moral conduct is personal faith in the sacredness of all human beings.⁶¹

A personal sense of morality must be developed and used by each lawyer, and only this will put the adversary system on the right track. Personal morals cannot be commanded or reduced to a list. They lie within each person, and each person, even the lawyer, will be held accountable for their stewardship.

⁶¹ Thomas M. Reavley, *The Moral Responsibility of Lawyers*, in 1 ETHICS: EASIER SAID THAN DONE No. 4 58, 59 (1989).